

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Wolf Creek Nuclear Operating Corporation and International Brotherhood of Electrical Workers, Local 225. Case 14–CA–181053

March 13, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE
AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on July 28, 2016, by International Brotherhood of Electrical Workers, Local 225 (the Union), the General Counsel issued the complaint on November 28, 2017, alleging that Wolf Creek Nuclear Operating Corporation (the Respondent or Wolf Creek) violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to recognize and bargain with it and to furnish relevant information following the Union’s certification in Case 14–RC–168543.¹ (Official notice is taken of the record in the representation proceeding as defined in the Board’s Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On December 20, 2017, the General Counsel filed a Motion for Summary Judgment. On December 21, 2017, the Board issued an order transferring the proceeding to

the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union’s certification of representative on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the Board may not revisit the Acting Regional Director’s 2000 determination in Case 17-UC-210 that the Buyer I, Buyer II, and Buyer III positions were managerial and, in any event, that the record evidence in Case 14–RC–168543 demonstrated that individuals serving in those positions and in the Lead Buyer position are managers.

As affirmative defenses, Wolf Creek asserts that the complaint should be dismissed because (i) its allegations are barred by *res judicata* and/or collateral estoppel, (ii) the individuals in the bargaining unit are managers, (iii) the bargaining unit is not appropriate, (iv) the complaint fails to state a claim upon which relief can be granted, and (v) Wolf Creek has acted lawfully and in good faith at all times.²

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find that there are no factual issues warranting a hearing with respect to the Union’s request for information. The complaint alleges, and the Respondent admits, that about February 29, 2016, the Union requested

¹ On February 16, 2016, the Regional Director in Case 14–RC–168543 issued a decision and direction of election in the petitioned-for unit. The Regional Director found that a May 4, 2000 unit-clarification decision in Case 17-UC-210—in which an Acting Regional Director found that Wolf Creek’s Buyers I, II, and III were managers—did not preclude revisiting the managerial status of individuals in these classifications in Case 14–RC–168543. The Regional Director in Case 14–RC–168543 further found that, on the record in that case, Wolf Creek had failed to establish that individuals working in the positions of Buyer I, Buyer II, Buyer III or Lead Buyer are managers. On April 7, 2017, a Board majority granted in part Wolf Creek’s request for review of the Regional Director’s decision in Case 14–RC–168543 and remanded the case to the Regional Director to more fully consider the preclusive effect, if any, of the 2000 unit-clarification decision. 365 NLRB No. 55 (2017). On May 9, 2017, after having reopened the record, the Regional Director issued a supplemental decision reaffirming the conclusions that the doctrine of *res judicata* did not preclude consideration of the Buyers’ managerial status and that the record failed to show that they are managers. By unpublished order dated October 27, 2017, the Board denied Wolf Creek’s request for review of the Regional Director’s supplemental decision.

² The Respondent’s first three affirmative defenses simply recapitulate the arguments raised by the Respondent and rejected by the Board in Case 14–RC–168543. As to the fourth affirmative defense, the complaint does indeed state claims upon which relief can be granted insofar as it alleges that the Respondent violated the Act by refusing to meet and bargain with the Union and by refusing to furnish relevant requested information. Finally, the Respondent’s good faith is not a valid affirmative defense to the allegation that the Respondent unlawfully refused to recognize and bargain with the Union, *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), or that it unlawfully refused to furnish relevant requested information, *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975).

by email that the Respondent furnish it with the following information:

1. Current pay information for the 4 existing Buyers
2. Salary information for the last 3 years for all Buyers including the recently retired Lead Buyer
3. Classification seniority information, including past titles for the existing buyers
4. Site Seniority information for all the buyers
5. Return of any Employee at will letters in the Current Employee
6. Par Bonus amounts for the last 3 years for all Buyers

It is well established that information concerning the terms and conditions of employment of unit employees is presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g., *Metro Health Foundation, Inc.*, 338 NLRB 802, 803 (2003). The Respondent has not asserted any basis for rebutting the presumptive relevance of the requested information. Rather, the Respondent contends that the Union was improperly certified, a contention that we have rejected. We find that the Respondent unlawfully refused to furnish the information sought by the Union.

Accordingly, we grant the Motion for Summary Judgment.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in Burlington, Kansas, and has been engaged in the production, transmission, and retail sale of electricity.

In conducting its operations during the 12-month period ending October 31, 2017, the Respondent purchased and received at its Burlington, Kansas facility goods and services valued in excess of \$50,000 directly from points outside the State of Kansas.

During that same time period, the Respondent provided goods and services valued in excess of \$50,000 to States other than the State of Kansas.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

³ The Respondent's requests that the complaint be dismissed and the certification of representative revoked are therefore denied.

Chairman Kaplan did not participate in the underlying representation case but he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice proceeding.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held February 24, 2016, the Union was certified on March 8, 2016, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas, EXCLUDING all office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

About February 29, 2016, the Union, by telephone, requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees. The Respondent has failed and refused to meet and bargain with the Union.

About February 29, 2016, the Union requested by email that the Respondent furnish it with the information set forth above, which is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. The Respondent has failed and refused to furnish the Union with the relevant information.

We find that these failures and refusals constitute an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, and by failing and refusing to provide the Union with the information it requested, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order the Respondent to cease and desist from such conduct. In addition, we shall order the Respondent to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement. We shall also or-

der the Respondent to furnish the Union the information that it requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, Wolf Creek Nuclear Operating Corporation, Burlington, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Electrical Workers, Local 225 (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of the unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time Buyers I, II, III and Lead Buyer employed by the Employer at its facility near Burlington, Kansas, EXCLUDING all office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.

(b) Furnish to the Union in a timely manner the information requested on or about February 29, 2016.

(c) Within 14 days after service by the Region, post at their facilities in Burlington, Kansas, copies of the attached notice marked "Appendix."⁴ Copies of the notice,

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former at any time since February 29, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 13, 2018

Marvin E. Kaplan, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

tional Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Electrical Workers, Local 225 (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT fail and refuse to furnish the Union with information that is relevant and necessary to its role as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

All full-time and regular part-time Buyers I, II, III and Lead Buyer employed by us at our facility near Burlington, Kansas, EXCLUDING all office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act, and all other employees.

WE WILL furnish to the Union in a timely manner the information requested on February 29, 2016.

WOLF CREEK NUCLEAR OPERATING CORP.

The Board's decision can be found at www.nlr.gov/case/14-CA-181053 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

